INDEX

TABLE OF CASES CITED

STATUTES AND TEXTS CITED

Supreme Court of the United States

OCTOBER TERM, 1948

No.

THE REPUBLIC OF THE UNITED STATES OF BRAZIL, trading under the name and style of LLOYD BRASILEIRO,

Petitioner,

against

GENERAL FOODS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of the Republic of the United States of Brazil, trading under the name and style of Lloyd Brasileiro, for a writ of certiorari to the United States Court of Appeals for the Second Circuit respectfully shows:

Jurisdiction

Jurisdiction is based on Title 28 of the United States Code, Section 1254, and Supreme Court Rule 38, par. 5(b).

Statement

Libellant claims $148,500 damages for the failure of the Lloyd Brasileiro, a common carrier by sea, to deliver about

half of a shipment of nuts by the S.S. *Felipe Camarao*, pursuant to an "on board" bill of lading issued by Lloyd Brasileiro (Rec. pp. 4-7). The principal facts have been stipulated (Rec. pp. 112-145).

General Foods ordered 10,000 bags of nuts from a shipper at Para, Brazil, in June, 1942, and one of the terms of the sales contract was that they were to be shipped under an "on board" bill of lading (Rec. p. 155). The United States had, because of the war, embargoed nuts as of July 1, 1942, and it was necessary for the shipper to deliver the nuts to the carrier by that date and to procure an ocean bill of lading therefor (Rec. p. 25). The shipper delivered 10,000 bags late in June on the Lloyd Brasileiro's dock, alongside the *Felipe Camarao*. Having received the nuts, the Lloyd Brasileiro then issued the "on board" bill of lading to the shipper by which it agreed to carry them on the *Felipe Camarao* to destination in the United States. Because more cargo was received at the dock than the ship could carry, about 5,000 bags were left behind when the *Felipe Camarao* sailed. The shipper notified General Foods of this by cable (Rec. pp. 120, 121) but not before General Foods had paid for the entire 10,000 bags. On August 13, 1942, the *Felipe Camarao* arrived at Pensacola, Florida, to which port the U. S. Navy had routed her. General Foods learned of the short delivery by August 19th when the ship had completed her discharge (Rec. p. 112). There was correspondence between the shipper and General Foods in August, 1942, while the ship was discharging. General Foods learned from the shipper by cable of August 22nd, that the balance was on another vessel, and *"for insurance purposes"*, that part was stowed on deck (Rec. p. 121); and then on August 28th, by airmail letter, it learned the name of the steamer, the *Osorio* (Rec. p. 125). That ship had loaded the nuts by August 14, 1942, and sailed in convoy on September 28th. General Foods wanted these nuts. Because of the embargo of July 1st by the United States, no more nuts could be imported unless licensed, and they were then worth approxi-

mately four times the price General Foods had paid for them. That is why General Foods was desirous of receiving the balance by the substituted steamer, the *Osorio*, and that is why General Foods did not proceed against Lloyd Brasileiro for the short delivery by the *Felipe Camarao*, but acquiesced to the on carriage of the balance by the *Osorio*. Shortly after September 30th, General Foods learned of the sinking of the *Osorio* by a submarine. General Foods at no time made any protest or claim against the Lloyd Brasileiro for its failure to deliver the balance of the nuts. After the loss, General Foods realized that it could recover from its insurer for a war loss due to the sinking of the *Osorio* by a submarine and it accordingly corresponded with Lloyd Brasileiro's agency at New York. At its request, Lloyd Brasileiro certified to it, for insurance purposes, that the missing nuts had actually been on board the *Osorio* at the time she was sunk (Rec. p. 137, Ex. 10). Upon receiving this certificate, General Foods, in March, 1943, presented proofs of the loss of the balance of the nuts on the *Osorio*, when she was sunk, to its insurer, the Insurance Company of North America. As one of the proofs of loss it filed the "on board" bill of lading of the *Felipe Camarao* as proof of its title and the contract of carriage (Rec. pp. 114, 140-143). The insurer thereupon paid General Foods the full amount of the claim *as a war loss* (Rec. p. 114) and then in June, 1943, filed this libel in the name of General Foods, claiming that Lloyd Brasileiro had breached its bill of lading contract. Although the "on board" bill of lading contained the usual clause exempting the carrier for losses occasioned by war perils (Rec. p. 198), the District Court decided in favor of General Foods and the Circuit Court affirmed its decision. The opinion of the District Court is in the record at pages 210-217, and it is reported in 1949 A. M. C. p. 79 and 82 Fed. Supp., p. 622. The opinion of the Circuit Court is in the record at pages 231-236 and in 1949 A. M. C. at p. 208, and is not as yet officially reported. An interlocutory decree has been entered in favor of libellant (Rec. p. 221).

The Questions Presented

(1) Did the cargo owner acquiesce in carriage of the balance of the cargo by the second ship?

(2) If it did not, then should a carrier which has fundamentally breached its bill of lading contract be held liable for a cargo loss, the proximate cause of which was not a fault of the carrier?

The Reasons Relied on for the Allowance of the Writ

The proximate cause of the loss of the cargo was not the failure of the Lloyd Brasileiro to carry all the nuts by the *Felipe Camarao,* but a war peril. The Circuit Court has held the carrier responsible on the theory of estoppel. It treated Lloyd Brasileiro's failure to carry all the nuts by the *Felipe Camarao* as a fundamental breach of its contract of carriage and the equivalent of a deviation. Hence, the Circuit Court held that the *Osorio,* the second ship, carried the balance of the nuts as an insurer and without the benefit of the bill of lading exemptions. The American doctrine of deviation which automatically makes a carrier an insurer, from the inception of the deviation, is an anachronistic survival of sailing ship days, when communications between vessels, owners and insurers was slow, and before present day cargo insurance policies, as a matter of course, held deviating vessels covered in any event. This doctrine of deviation is not settled. It should be. Its application is harsh and unjust as in the present case. It makes the carrier responsible for losses where the underwriter alone should be liable.

As presently interpreted, the American decisions hold that when a carrier deviates, it thereby and immediately becomes an insurer with respect to cargo, and responsible

for all cargo losses occurring thereafter, even where the deviation itself is not the proximate cause of the loss.

This doctrine seriously affects all carriers by sea and penalizes them in cases where the insurer of the risk directly causing the loss should pay. Our Courts should follow the English decision in *Tate & Lyle, Ltd.* v. *Hain S.S. Co., Ltd.* (*The Tregenna*), 55 Lloyd's List Law Reports 159, at pp. 173-174, which holds, contrary to American decisions, that the carrier becomes an insurer, not automatically, but only upon the election of the cargo owner to so treat him. That decision gives the carrier the opportunity of making a new contract or at least of insuring the cargo for his own account.

Divergence as to marine insurance law between decisions of the Courts of the United States and of England has been repeatedly recognized by the Supreme Court as a reason for granting a writ. *Aetna Insurance Co.* v. *United Fruit Co.* (*The Almirante*), 304 U. S. 430, and the cases cited therein. That there is some divergence on this point seems apparent from a comparison of Judge Learned Hand's opinion in the *Tregenna*, 121 Fed. (2d) 940, at p. 944, col. 1, and Lord Atkins' opinion in *Tate & Lyle, Ltd.* v. *Hain S.S. Co., Ltd.* (*The Tregenna*), *supra*, and we have attempted to show this conflict in our accompanying brief.

Our Courts should also interpret the deviation clause of the Carriage of Goods by Sea Act of 1936 as imposing liability on the carrier only for loss directly resulting from the carrier's negligence, and not merely because the carrier has made an unreasonable deviation (compare *The San Giuseppe*, 1941 A. M. C. 315, at p. 319, *infra*, not officially reported).

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit should be granted.

New York, New York, April 20, 1949.

REPUBLIC OF THE UNITED STATES OF BRAZIL,
trading under the name and style of
LLOYD BRASILEIRO,
Petitioner,

By FRANK J. MCCONNELL,
Proctor.

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that, in my opinion, it is well founded and the cause is entitled to favorable consideration of the court.

New York, New York, April 20, 1949.

FRANK J. MCCONNELL,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1948

No.

THE REPUBLIC OF THE UNITED STATES OF BRAZIL, trading under the name and style of LLOYD BRASILEIRO,

Petitioner,

against

GENERAL FOODS CORPORATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

POINT I

Lloyd Brasileiro made partial delivery of the nuts to General Foods at Pensacola by the *Felipe Camarao*. General Foods knew in August and September, 1942, the balance had been loaded on the *Osorio* and that Lloyd Brasileiro intended to carry them by that ship. It made no complaint or protest and did not notify the Lloyd Brasileiro that it would hold it as an insurer though it had ample time to do so. Its conduct amounted to acquiescence in delivery of the balance by the *Osorio* and petitioner contends that it waived its right to have had all the nuts delivered by the *Felipe Camarao*.

The *Felipe Camarao* loaded half the nuts at Para late in June, 1942, discharged them at Pensacola, Florida, between August 13th and August 19th, 1942, and General Foods learned at latest by about August 28, 1942, that the balance had already been loaded on another vessel, the *Osorio* (Rec. p. 125). From that time on both Lloyd Brasileiro and General Foods treated the bill of lading contract as subsisting. The *Osorio* prepared to sail in convoy and General Foods looked forward to receiving the nuts by that vessel. It wanted these nuts because further shipments were embargoed after July 1st by the United States and these nuts were already worth about four times the amount General Foods paid for them. The District Court however held that there was nothing in the conduct of General Foods to show it intended to waive its right to treat the ship as an insurer. But General Foods did not notify Lloyd Brasilerio that it would hold the Lloyd Brasileiro as an insurer. Neither is there anything in the record to suggest that the Lloyd Brasileiro intended to carry the balance of the nuts on the *Osorio* as an insurer.

The Circuit Court quoted (Rec. p. 234) from Smith's letter of August 24, 1942 (Ex. 1-L, Rec. p. 126), and held it was obviously the intention of Smith to hold the Lloyd Brasileiro to a guaranteed delivery unless the balance of the nuts were actually delivered. Here, we think the Circuit Court was decidedly in error for we see nothing in Smith's letter, or anything in the conduct of General Foods at the time, to suggest that General Foods intended to hold the Lloyd Brasileiro as an insurer. Smith noted that but 4,333 bags had been delivered by the *Felipe Camarao* and went on to say:

> "I think it proper to notify you we will file claim for any shortage or damage, however, as you have given us to understand you have another ship now at or due New York with at least 5,000 bags of this shortage and you have guaranteed us a proportionate delivery from certain unidentified lot of nuts arriving on the *Felipe Camarao* now being held at Pensacola, we are holding the matter of filing claim in abeyance for the present * * *."

Note that Smith expected only a guaranteed delivery of the proportion of unidentified nuts already landed by the *Felipe Camarao,* and there is nothing in his letter to suggest he expected the Lloyd Brasileiro to guarantee delivery of the balance of the nuts coming by the following ship.

Petitioner does not claim that this letter of Smith's alone constituted a waiver. It claims that the cables, correspondence and conduct of General Foods in August and September, 1942, show that General Foods had knowledge of and acquiesced in the carriage of the balance of the nuts by the *Osorio,* and that after the loss of the nuts it presented its proofs of loss to its insurer on the basis of the *Felipe Camarao* bill of lading contract of carriage, attempted carriage of the nuts by the *Osorio,* and loss while on the *Osorio* by a war peril; and that by those proofs of loss General Foods confirmed the position it had previously taken with the Lloyd Brasileiro.

It is well settled that even a fundamental breach of the bill of lading contract, such as by deviation, can be waived.

In *The Delaware,* 81 U. S. 579, 20 L. Ed. 779, the carrier issued a clean bill of lading but wrongfully stowed the goods on deck and they were lost by perils of the sea. The Court held the carrier liable but noted that the shipper might have, for a new consideration, waived the breach. There was a consideration in the instant case because the Lloyd Brasileiro offered to carry the goods by a different means. It risked another of its vessels. *Williston on Contracts,* Rev. Ed. Vol. I, Sec. 139, pp. 494 et seq., and Vol. III, Secs. 680-686 at pp. 1964 et seq., and *Restatement of Law of Contracts,* Vol. II, § 417-c.

The leading admiralty case on waiver is *Hain S. S. Co. Ltd.* v. *Farr et al.* (*The Tregenna*), 35 Fed. Supp. 118, reversed 121 Fed. (2d) 940. There Farr chartered *The Tregenna* with option to carry sugar to Europe from two ports in Cuba and a further option to load at one unnamed Dominican port. Before reaching the third port, the vessel left her route and deviated. After the deviation, she reached her third port and Farr with knowledge of the

deviation, permitted her to load. Leaving the third port, the vessel stranded on a bar and was unable to proceed. The vessel was discharged and her cargo forwarded by a different vessel. The Circuit Court for the Second Circuit held that Farr, by inaction, had waived the deviation and Judge Learned Hand said:

> "Hence the question arises whether Farr's inaction after discovering the deviation barred them from taking advantage of this default * * * *but if he learns of a deviation while the voyage is in progress, and without protest or reservation of his rights, allows her to make good her fault so far as she can, it is certainly inconsistent with fair dealing for him afterwards to assert that the remainder of the voyage was not performed under the charter,* if that were by the owners ordinary assumption * * *". (Our emphasis.)

We might note at this point that the instant suit is *in personam* against the Lloyd Brasileiro for its breach of the contract and not *in rem* against the *Felipe Camarao* to enforce a maritime lien for her failure to deliver. The *Felipe Camarao* never received the missing nuts and she could not be held *in rem.*

The English courts had a parallel case arising out of the same *Tregenna* deviation, entitled *Tate & Lyle Ltd.* v. *Hain S. S. Co. Ltd.,* 55 Lloyd's List Law Reports, p. 159; 41 Commercial Cases 350. There with the same facts before it, the Court said:

> "Lord Atkin * * * everyone is agreed that it (deviation) is a serious matter. * * * The event falls within the ordinary law of contract. The party who is affected by the breach has the right to say, 'I am not now bound by the contract whether it is expressed in charter-party, bill of lading or otherwise.' He can, of course, claim his goods from the ship; whether and to what extent he will become liable to pay some remuneration for carriage I do not think arises in this case for reasons I will give later; but I am satisfied that once he elects to treat the contract as at an end he is not bound by the promise to pay the agreed freight any

more than by his other promises. *But, on the other hand, as he can elect to treat the contract as ended, so he can elect to treat the contract as subsisting,* and if he does this with knowledge of his rights he must in accordance with the general law of contract be held bound." (Our emphasis.)

Waiver was considered in the following deviation cases:

Texas Petroleum Corporation v. *S. S. Margaret Lykes, et al.*, 1944 A. M. C. 1128; 57 Fed. Supp. 466.

The Peytona, Fed. Cas. No. 11059 at p. 413.

The Compania Primera de Navigacion, Ltda. v. *Compania Arrendataria del Monopolio de Petroleos, S. A.*, 65 Lloyd's List Law Reports, p. 7, citing and following Tate & Lyle, Ltd. v. Hain S. S. Co. Ltd. supra.

The Henry W. Cramp, 6 Fed. (2d) 900, 20 Fed. (2d) 320.

Thatcher v. *McColloh*, Fed. Cas. 13862, at p. 891.

Sidney Blumenthal & Co., Inc. v. *United States*, 21 Fed. (2d) 798.

Western Lumber Manufacturing Co. et al. v. *United States, et al.* (S. S. Brush, 1926 A. M. C. 91), 9 Fed. (2d) 1004.

The District Court recognizing that General Foods did wait for and expect the nuts by the *Osorio* without complaint, held it was justified in waiting before attempting to mitigate its damage (Rec. pp. 216-217). This is not reasonable because there was no damage to mitigate until the vessel was sunk. Insofar as any intent can be inferred from the record, General Foods waited for the nuts because it wanted them. It could not hope to import any more because of the embargo (Rec. pp. 25, 144), and these nuts were then worth about four times the amount General Foods had paid for them. It had every reason to hope that the nuts would arrive by the *Osorio* and the only inference from

the record is that it hoped the Lloyd Brasileiro would deliver them despite the sea and war perils which the ship would encounter and against which General Foods had ample insurance.

When the Lloyd Brasileiro failed to deliver all the nuts by the *Felipe Camarao,* General Foods had the choice of declaring the carrier an insurer and holding it for damages for non-performance, or of consenting to performance of the balance of the contract by another ship and then claiming damages for delayed performance. It could not, however, maintain an ambiguous silence or by its conduct show acquiescence in the carriage of the balance by the *Osorio,* and at the same time hold the Lloyd Brasileiro as an insurer. *This latter, however, is what the Circuit Court has done.* Although General Foods treated the bill of lading contract as subsisting, the Court has held that the breach deprived the Lloyd Brasileiro of the exceptions of its bill of lading contract, that the breach automatically made it an insurer of the carriage of the balance of the nuts, and it has held the carrier responsible though the loss occurred through no fault of its own, and though the peril which excused the loss had been specifically insured against by General Foods.

The Circuit Court decided there was no waiver and no accord and satisfaction; but we think there was an accord when General Foods learned on August 28, 1942, that the *Osorio* was sailing with the balance of the nuts and thereafter acquiesced in that substituted carriage, and that there was a satisfaction when the ship sailed from Para pursuant to the terms of the bill of lading contract which both parties then treated as still subsisting.

POINT II

Petitioner contends that a carrier by sea should not be responsible for loss of cargo, merely because there was a deviation or some fundamental breach of the contract of carriage which of itself did not result in any loss. The decision of the Circuit Court holds the carrier responsible for the loss though the proximate cause of the loss was a war peril and not the failure of the *Felipe Camarao* to carry all the nuts.

At common law a carrier by sea was an insurer and was excused for nothing save act of God, act of public enemy or shipper's own fault. The Harter Act of February, 1893, 46 U. S. Code, Secs. 190-195, provided that *if* the carrier used due diligence to make his vessel seaworthy, then he would be exempt from certain liabilities. Under that Act, the carrier was liable, however, even where the unseaworthiness had not caused the loss. *The Isis,* 290 U. S. 333; 1933 A. M. C. 1565. Since 1936, carriage of cargo has been governed by the Carriage of Goods by Sea Act, 46 U. S. Code, Secs. 1300-1315. By that Act the carrier is still responsible for failure to use due diligence in making his vessel seaworthy *but he is not responsible for loss unless it is the result of his fault.*

Section 4 of that Act recites the rights and immunities of the carrier; for example, that he shall not be responsible for loss caused by perils of the sea or act of war. Then paragraph (4) of the section deals with deviation as follows:

> "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation, shall not be deemed to be an infringement or breach of this Act or the contract of carriage, and the carrier shall not be liable for any loss or damage *resulting therefrom:* Provided, however, that if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable." (Our emphasis.)

This section exempts the carrier from liability for loss *resulting from* reasonable deviations. We interpret it to mean that the carrier is not responsible for losses sustained which are proximately caused by a reasonable deviation, for example, a loss the result of delayed carriage; but that the carrier is responsible in cases of unreasonable deviations where the deviation is the *proximate* cause of the loss.

As applied in admiralty law, the term "deviation" was originally used to explain the wandering or straying of a vessel from the course of the voyage recited in her bill of lading, but in the course of time it has come to mean any variation in the conduct of a ship in the carriage of goods whereby the risk incident to the shipment will be increased, such as the carrying of cargo on the deck of the ship contrary to custom and without the consent of the shipper, excessive delay in carrying the goods, failure to deliver the goods at the port named in the bill of lading and carrying them further to another port, etc.

Leaving port in an unseaworthy condition is a fundamental breach of the bill of lading contract, yet it has been held not to constitute a deviation. *The Malcolm Baxter,* 20 Fed. (2d) 304, 277 U. S. 323, 1928 A. M. C. 960; *The Turret Crown,* 297 Fed. 766, 1924 A. M. 253, and *Kish* v. *Taylor,* 1912 A. C. 604. The only result of such a breach is liability for the damage which approximately results. In *The Willdomino,* 300 F. 5, 272 U. S. 718, the ship stranded after deviating and she was not permitted the exemption of error of navigation. In *The Pelotas,* 66 Fed. (2d) 75, 1933 A. M. C. 1188, the ship stranded during the deviation and she was held liable as an insurer. In *The Carso,* 91 Fed. (2d) 960, 1937 A. M. C. 1078, the ship delivered cheese in bad condition. Time to sue under the bill of lading had lapsed. Cargo proved that the good order bill of lading had been issued to the shipper before the goods had been received by the carrier and it was claimed that this act on the part of the carrier was the equivalent of a deviation and that the contract being displaced the ship had carried the cheese

as an insurer without the benefit of the time to sue clause. The Court held that the action of the carrier had not resulted in any prejudice to the consignee and declined to treat the carrier's act as a fundamental breach or as a deviation. In *The Ida,* 75 Fed. (2d) 278, 1935 A. M. C. 302, the vessel deviated geographically. Later the vessel caught fire at destination. There was no causal relation between the deviation and the fire damage and the Court gave the vessel owner the benefit of the fire statute. In *The Zaca,* 1937 A. M. C. 1153; 1939 A. M. C. 912 and 105 Fed. (2d) 160, there was deviation followed by fire damage, but because there was no causal relation between the damage and the deviation, the Court gave the vessel owner the advantage of the fire statute.

In *Tate & Lyle, Ltd.* v. *Hain Steamship Co., Ltd.* (*The Tregenna*), 55 Lloyd's List Law Reports, p. 159, the ship deviated and then after the deviation was over she stranded. The cargo owners claimed that the deviation had made the carrier an insurer and that it could not take advantage of the clause in the contract of carriage, exempting it from liability for the error in navigation which had caused the stranding. The Court decided, however, that the cargo owners had waived the deviation by their inaction. Lord Atkin discussed deviation and said as to election:

> "My lords, the effect of a deviation upon a contract of carriage by sea has been stated in a variety of cases but not in uniform language. Everyone is agreed that it is a serious matter. Occasionally language has been used which suggests that the occurrence of a deviation *automatically* displaces the contract, as by the now accepted doctrine does an event which 'frustrates' a contract. In other cases, where the effect of deviation upon the exceptions in the contract had to be considered, language is used which Sir Robert Aske argued shows that the sole effect is as it were to expunge the exceptions clause as no longer applying to a voyage which from the beginning of the deviation has ceased to be the contract voyage. I venture to think that the true view is that the departure from the voyage con-

> tracted to be made is a breach by the shipowner of his contract, but a breach of such a serious character that however slight the deviation the other party to the contract is entitled to treat it as going to the root of the contract and *to declare himself as no longer bound by any of its terms* • • •" (p. 173). (Our emphasis.)

In other words, a carrier, in Lord Atkins' opinion, should not become an insurer unless the cargo owner has elected to treat him as an insurer and made his election known to the carrier.

In the American parallel case, *The Tregenna,* 121 Fed. (2d) 940, Judge Learned Hand, who wrote the opinion in the Circuit Court of Appeals, noted Lord Atkins' language in the English case on this point and, after discussing the serious nature of breach by deviation, said:

> "Indeed, it may be doubted whether, if the law were to be formulated today for the first time, the same principle would not apply as applies to other contracts;—i.e., that the only breach which entitles the promisee to repudiate the whole contract is one which goes to the root of the venture. • • • The law has not been so written, however, and certainly all but the most trivial deviations are considered gravely to affect the contract. *How far they do affect it the courts are not in entire agreement;* at times it has even been said that the shipowner converts the cargo • • • though we should hesitate to press the consequences so far. But it is settled that deviation strips the ship of all excuses in her charter-party, and imposes upon her at least the liability of a common carrier; i.e., of an insurer • • •."

In *The San Giuseppe,* 122 Fed. (2d) 579, 1941 A. M. C. 315, and 1941 A. M. C. 1301, it was claimed that the vessel had unnecessarily deviated into Norfolk for bunker coal while on a voyage to England. While there, Italy declared war upon England and she was then unable to proceed. The Circuit Court of Appeals held the deviation was reasonable and that the damage would have occurred inevitably because of the declaration of war. In the District Court

it was noted that the many decisions briefed were practically all rendered before the passage of the Carriage of Goods by Sea Act, and the Court thought the doctrine of deviation should now be considered in the light of paragraph 4 of Section 5 of that Act (*supra*). The Court noted that any damage sustained resulted from the declaration of war and that there was no causal relation between the damages claimed and the alleged deviation. Then the Court cited *Benedict on Admiralty*, 6th Edition, Knauth, 1940, at pp. 291, 292:

> "The principal difference between the Harter Act and the Hague Rules or Carriage of Goods by Sea Act, is that the negligence or exception clause of the Harter Act, Section 3, is conditional; it never operates to exonerate the carrier unless due diligence has been used to make the ship seaworthy *in all respects*, regardless of causal connection; whereas the exception clause of the Act of 1936, Art. 4, is positive: it always operates to exonerate the carrier unless due diligence has not been used in some respect proximately causing or contributing to the loss."

The District Court then went on to say:

> "The language of par. 4, Section 4, above quoted, would intimate that it is open to a similar construction and that the only damage resulting from an unreasonable deviation which may be recovered is 'any loss or damages resulting therefrom', that is that the loss resulted from the deviation, not from some other intervening cause."

Ordinarily, the fundamental breach of a contract creates liability for damage which proximately results. This claim is for breach of a contract but it is just as true in tort cases. There should be causal connection between the breach and the loss. The breach in this instance was the failure of the carrier to carry all the nuts by the *Felipe Camarao*. The carrier substituted the *Osorio* for the balance. Thus far the consignee had suffered no prejudice and performance of the contract of carriage was being performed upon the

same terms. When the *Osorio* was sunk by the submarine, the proximate cause of her loss was an act of war and not the negligence of the Lloyd Brasileiro at Para in failing to take all the nuts by the *Felipe Camarao*.

Upon the trial, General Foods relied upon *Olivier Straw Goods Corp.* v. *Osaka Shosen Kaisha* (*The Alaska Maru*), 27 Fed. (2d) 129 and 47 Fed. (2d) 878. In the first decision, the Second Circuit held that the carrier was estopped from denying that the goods had been received on board the ship. The carrier had received the goods on its dock and had then issued an on-board bill of lading covering them which designated a particular ship. The goods were stolen by a land mob from the dock before the ship arrived at the port. Estoppel, of course, connotes prejudice and in the instant case General Foods was not prejudiced in any respect until the sinking of the *Osorio* with her cargo. In the second decision the Court had before it the question of whether the carrier could take advantage of the clause in its bill of lading limiting its liability for losses. The Court said:

> "Certainly a breach like the one here which arose from a failure to ship the cargo at all, with its consequent loss or destruction on land, was no less fundamental than a deviation in the voyage, or than stowage of cargo on deck contrary to agreement, or than misdelivery of goods. * * * In all such circumstances valuation clauses in the bill of lading have been held inoperative to relieve the shipowner * * *" They (the clauses) manifestly were only intended to cover cargo shipped and logically can have no relation to goods which were not placed on the vessel and would not have been lost if disposed of as agreed. In other words, the limitation clauses applied only to cases where the damage was due to losses encountered during the performance of the contract contained in the bill of lading and their incidence was conditioned upon the shipment of the cargo."

There is the distinction between the instant case and *The Alaska Maru* that the Lloyd Brasileiro received the

goods on its ships, that the ships did sail with the goods, and that the goods were lost while transportation was in progress. General Foods suffered no prejudice, merely because Lloyd Brasileiro carried half by the *Felipe Camarao* and attempted to carry the other half by the *Osorio*. In fact, the submission of the *Felipe Camarao* bill of lading by General Foods to its insurer as the contract of carriage, together with proofs of its loss on the *Osorio*, validated that bill of lading contract so far as the General Foods and the Lloyd Brasileiro were concerned. There was no prejudice whatever until the *Osorio* was sunk by the war peril and hence no reason for estoppel. Another distinction is that there was no opportunity for waiver in *The Alaska Maru*. There, the goods were lost before the consignee learned of the carrier's breach. There could be no waiver in that case because there were no goods against which waiver could apply. In the instant case, General Foods had been advised the balance of the goods were on their way and it had the name of the carrying vessel (Rec. pp. 125, 123-124). Another distinction is that the goods in the instant case were carried subject to the Carriage of Goods by Sea Act which defines "reasonable" deviation and makes the carrier responsible only where its fault has proximately caused the loss.

The Carriage of Goods by Sea Act of April, 1936 (46 U. S. Code, Secs. 1300-1315), declares the responsibilities of carriers of goods by sea. Liability is predicated upon fault (Sec. 1304). The Act permits reasonable deviations. It provides no specific penalty for unreasonable deviation (Sec. 1304, par. 4). The American decisions, however, hold that where there has been a fundamental breach of a contract, the equivalent of an unreasonable deviation, then the carrier *automatically* loses its bill of lading exemptions and becomes an insurer. The American cases, however, are not consistent for they have at times given the carrier the advantage of the fire statute (46 U. S. Code, Sec. 182) and the limitation of liability statutes (46 U. S.

Code, Secs. 181-189) even where the carrier has deviated from the bill of lading voyage.

Hain S. S. Co. Ltd. v. *Farr et al.* (*The Tregenna*), 121 Fed. (2d) 940, decided that no matter how serious the deviation may be, the cargo owner may elect to waive it and consent to a substituted performance. *Tate & Lyle, Ltd.* v. *Hain S. S. Co. Ltd.* (*The Tregenna*), 55 Lloyd's List, Law Reports, 149, decided that the cargo owner, if he wishes to hold the carrier as an insurer, *must declare his intention to do so.* This we think was new law and we find nothing like it in the American decisions. The District Judge in *The San Giuseppe,* 1941 A. M. C. 315, 1941 A. M. C. 1301, and 122 Fed. 2, 579, interpreted paragraph 4 of Section 4 (46 U. S. C. §§ 1300-1315) of the Carriage of Goods by Sea Act defining reasonable deviation to mean that a carrier was not liable in a deviation case, merely because of the occurrence of the deviation, but only where the loss was the proximate result of the deviation.

Petitioner submits that a carrier by sea should not be deprived of its bill of lading and Carriage of Goods by Sea Act exemptions, such as act of war, where there has been a deviation or a fundamental breach of the contract, unless the loss or damage results proximately from fault on the part of the carrier. In other words, petitioner contends that this Court should adopt the views of Lord Atkin in *The Tregenna* (the English decision) and require the cargo owner to elect whether or not to treat the carrier as an insurer, and also the suggestion of the District Court in *The San Giuseppe,* interpreting the deviation section of the Carriage of Goods by Sea Act of 1936 as holding the carrier liable only where his fault is the proximate cause of the loss.

The result of the holding of the Circuit Court is that Lloyd Brasileiro is being unjustly penalized for attempting performance of its bill of lading contract in wartime by two ships instead of one, and the insurer is being enriched at the expense of the Lloyd Brasileiro.

CONCLUSION

A writ of certiorari should be granted to review the decision of the Circuit Court for the Second Circuit in this case.

Dated, New York, N. Y., April 20, 1949.

Respectfully submitted,

FRANK J. MCCONNELL,
Proctor for Petitioner,
Republic of the United States of Brazil.

FRANK J. MCCONNELL,
JAMES D. BROWN,
PAUL M. JONES,
of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1948.

No. .

THE REPUBLIC OF THE UNITED STATES OF BRAZIL, trading under the name and style of LLOYD BRASILEIRO,

Petitioner,

—against—

GENERAL FOODS CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

The petitioner presents two questions for the consideration of this Court (Pet., p. 4):

> "1. Did the cargo owner acquiesce in carriage of the balance of the cargo by the second ship?"

Under this heading the petitioner advances the argument that respondent waived right of recovery based on the false assertion in petitioner's bill of lading that the whole shipment of 10,000 bags of nuts had been laden on the "Felipe Camarao", when, in fact, 5674 bags had not been so stowed. Both the District Court (R. 217, 220) and the Court of Appeals (R. 234, 235, 236) determined this issue of fact adversely to petitioner, and held that the evidence does not support the claim of waiver but, indeed, negatives it.

The second question which the petitioner presents to this Court is couched in these words (Pet., p. 4):

> "• • • should a carrier which has fundamentally breached its bill of lading contract be held liable for a cargo loss, the proximate cause of which was not a fault of the carrier."

This question was not raised in either the District Court or the Court of Appeals. As the latter court commented (R. 233), the only defense which the present petitioner advanced was that the present respondent had waived petitioner's breach of its contract. That court also pointed out (R. 233) that the present petitioner conceded that the case was controlled by *Olivier Straw Goods Corp.* v. *Osaka Shosen Kaisha* (*The Alaska Maru*), 27 F. (2d) 129 (C. C. A. 2), cert. denied 278 U. S. 618, 47 F. (2d) 878 (C. C. A. 2), cert. denied 283 U. S. 856, unless breach of the contract had been effectively waived. That court commented that at the start of the trial in the District Court the present petitioner explained to the court:

> "the sole issue in this case is whether the General Foods waived the short shipment by the 'Felipe Camarao' by agreeing to accept the balance of its shipment on another steamer."

So far as we are aware, there is no decision in any Federal court in conflict with the principle of *The Alaska Maru* (*supra*). Both courts below pointed out that the decisions in *The Tregenna,* 121 F. (2d) 940 (C. C. A. 2); and by the House of Lords in *Tate & Lyle, Ltd.* v. *Hain S. S. Co., Ltd.* (*The Tregenna*), 55 L. L. L. R. 159, on which petitioner relies (Pet., p. 5), are not in conflict with *The Alaska Maru* and are not in point in the present case.

The bill of lading was purchased by the present respondent in reliance on the bill of lading acknowledgment that the whole shipment was on board the "Felipe Camarao".

Neither the respondent nor the petitioner's U. S. General Manager knew that the full shipment was not on the "Felipe Camarao" until that vessel arrived at Pensacola and finished her discharge. At that time the petitioner had already stowed the missing 5674 bags of nuts on the S. S. "Osorio" (R. 49, 112, 113, 218, 219).

Petitioner's assertions that respondent filed the bill of lading with its underwriters as a contract of carriage (Pet., pp. 3 and 19), and that the underwriter paid respondent's claim "as a war loss" (Pet., p. 3), are without support in fact or evidence.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JOHN W. R. ZISGEN,
Counsel for Respondent,
General Foods Corporation.